IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Morris Communications, Inc., Petitioner,	)	
	)	
v.	)	No. 08-1080
	)	
Federal Communications Commission and United States of America, Respondents	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO MOTION FOR STAY PENDING REVIEW

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INTRODUCTION

More than a decade after winning nine Specialized Mobile Radio ("SMR") licenses in a 1996 auction conducted by the Federal Communications Commission, Morris Communications has yet to submit full payment for any of those licenses. It defaulted on its installment payment obligations in February 2002, causing its licenses to cancel automatically under FCC rules. Morris subsequently filed two petitions asking the Commission to waive the installment payment rules and to reinstate the licenses. While those petitions were pending, Morris proceeded without authorization to construct and commence operation of two SMR stations in an area covered by two of the canceled licenses.

The Auctions and Spectrum Access Division ("Division") of the FCC's Wireless Telecommunications Bureau denied Morris's waiver requests in April 2005.[1] The Commission upheld the Division's decision in an order issued earlier this year. *Morris Communications, Inc.*, 23 FCC Rcd 3179 (2008) ("*Order*"). The Commission also concluded that in light of the automatic cancellation of Morris's licenses, Morris could no longer operate the SMR stations it had decided to build after its licenses canceled. To protect Morris's subscribers and provide for an orderly transition, the agency directed Morris to cease operation of those stations within 180 days after the *Order*'s release. *Order* ¶ 51.

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[1] Letter from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Ronald E. Quirk, Jr., Counsel for Morris Communications, Inc., 20 FCC Rcd 8176 (2005) ("*Division Order*").

Morris has petitioned for review of the *Order* and now moves for a stay pending that review. For the reasons discussed herein, Morris has not come close to justifying a stay in this case. In particular, its cursory list of undeveloped issues it plans to assert on appeal does not establish a substantial likelihood of success. In addition, it fails to offer any evidence or detail to support its claim of irreparable harm. Accordingly, the Court should deny the motion for stay.

BACKGROUND

1. A 1993 amendment to the Communications Act expressly authorized the FCC to award certain spectrum licenses via competitive bidding. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2349 (¶ 1) (1994) ("*Second Auction Rules Order*") (citing 47 U.S.C. § 309(j)). For purposes of implementing that provision, Congress directed the Commission to design its auction rules to "ensure that … small businesses … are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D); *see also id.* § 309(j)(3)(B).

In an effort to fulfill this statutory mandate, the Commission in 1994 adopted installment payment rules that permitted qualified small businesses in certain auctions to pay their winning bids in quarterly installments. *Second Auction Rules Order*, 9 FCC Rcd at 2389-91 (¶¶ 231-240). Under those rules, which have since been superseded, any licensee whose installment payment was more than 90 days past due was in default unless it requested and received a grace period from the Commission. *Id.* at 2391 (¶ 240). Licensees could request a grace period ranging from 90 to 180 days. *Ibid.*; *see also* 47 C.F.R. § 1.2110(d)(4)(i), (ii) (1994).

In 1997, the FCC amended its installment payment rules to provide for "automatic" grace periods. *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures,* 13 FCC Rcd 374, 436 (¶ 106) (1997) ("*Third Auction Rules Order*"), *aff'd, Celtronix Telemetry, Inc. v. FCC,* 272 F.3d 585 (D.C. Cir. 2001). Under the revised rules, which apply to Morris in this case, a licensee that fails to make a timely installment payment "will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee." *Ibid.* If the licensee fails to make the required payment within this 90-day period, it "will automatically be provided a subsequent 90-day grace period, … subject to a second, additional late fee equal to ten percent of the initial required payment." *Ibid.* Any licensee that fails to make the required payment (including any applicable late fees) within six months of the due date for its installment payment "shall be in default," "its license shall automatically cancel" without any action by the Commission, and "it will be subject to debt collection procedures." 47 C.F.R. § 1.2110(g)(4)(iv).

The revised rules applied "only to existing licensees who are currently paying for their licenses in installments" (including Morris, which won its licenses in a 1996 auction). *Third Auction Rules Order*, 13 FCC Rcd at 436 (¶ 106); *see also Celtronix,* 272 F.3d at 588-90 (affirming the FCC's application of the revised rules to existing licensees).[2]

[2] In 1997, the FCC decided to discontinue its installment payment program for future auctions. *Third Auction Rules Order,* 13 FCC Rcd at 397-400 (¶¶ 38-40).

2. This case concerns an auction of licenses to provide SMR service. SMR licensees use radio systems to "provide land mobile communications services … in the 800 MHz and 900 MHz bands on a commercial basis." *See* 47 C.F.R. § 90.7 (defining "Specialized Mobile Radio system"). In April 1996, the FCC completed an auction of 900 MHz SMR licenses.[3] Each license authorized service in a Major Trading Area ("MTA"). Morris submitted the winning bids for nine licenses in four different MTAs: two in Charlotte, North Carolina; one in Birmingham, Alabama; two in Nashville, Tennessee; and four in Knoxville, Tennessee.

In a public notice issued on October 16, 1996, the Commission announced that Morris (among others) had qualified for the agency's installment payment program. Public Notice, *FCC Announces Grant of 900 MHz Specialized Mobile Radio MTA Licenses,* 11 FCC Rcd 13188, 13189 (1996). The Commission conditioned the grant of Morris's licenses on Morris's timely execution and submission of "a note documenting [Morris's] installment payment obligations" for each license "and a security agreement commemorating the Commission's security interest in the license in the event of default." *Id.* at 13188. Morris complied with this condition. Its installment payment plan note and security agreement are attached to the stay motion as Exhibit 2.

Morris's licenses were expressly "conditioned upon the full and timely payment of all moneys due pursuant to … the Commission's rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement

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[3] Public Notice, *FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas*, 11 FCC Rcd 18599 (1996).

executed by the licensee." *See Order* at n.25 (quoting from Morris's licenses). Each license stated: "Failure to comply with this condition will result in the automatic cancellation of this authorization." *Ibid.*

For several years, Morris made timely installment payments on its licenses. It failed, however, to make any of the payments that were due on July 31, 2001. Under the rules in effect at that time, Morris could have avoided defaulting on its licenses by submitting payment (along with any applicable late fees) during one of the two automatic 90-day grace periods that followed the payment deadline. But Morris did not make the required payments before the grace periods expired. Accordingly, pursuant to FCC rule, Morris's licenses automatically canceled on February 1, 2002 without any action by the Commission or its staff, and Morris became subject to the Commission's debt collection procedures. *Order* ¶ 6; *see also* 47 C.F.R. § 1.2110(g)(4)(iv).

On February 5, 2002 – five days after the grace periods expired, and more than six months after the installment payment deadline – Morris wired to the Commission the amounts that had been due on July 31, 2001. *Order* ¶ 7. Several months later, in an effort to persuade the Commission to reinstate the canceled licenses, Morris filed two requests for waiver of the installment payment rules. *Id.* ¶¶ 8-9. After October 2002 (while its waiver requests were still pending), Morris unilaterally decided to stop making payments altogether with respect to seven of its licenses (for the MTAs other than Charlotte). *Id.* ¶ 13.

In addition, while its waiver requests were still pending, Morris proceeded without authorization to construct and commence operation of two SMR systems in the Charlotte MTA, a market covered by two of the canceled licenses. *Id.* ¶ 50. It stopped making post-default payments on those licenses after January 2005.

3. By letter dated April 25, 2005, the Auctions and Spectrum Access Division of the FCC's Wireless Telecommunications Bureau denied Morris's waiver requests. *Division Order,* 20 FCC Rcd at 8176. The Division found that Morris had "failed to demonstrate that the underlying purpose of the Commission's payment rule would not be served, or would be frustrated, by [the rule's] application in this particular case." *Id.* at 8179. In the Division's judgment, strict enforcement of the installment payment rules "was essential to safeguarding the integrity" of spectrum auctions "and the Commission's licensing process." *Ibid.* The Division also determined that Morris had "failed to present any unique facts or circumstances" that would justify a waiver of the FCC's rules in this proceeding. *Id.* at 8181.

Morris applied to the Commission for review of the *Division Order*. In December 2005, while its application for review was pending, Morris for the first time requested an STA for its two Charlotte stations, which it had been operating without any FCC authorization for nearly three years. By the time it made this request, Morris had stopped making payments on any of its licenses. The Commission granted an STA to Morris on December 28, 2005. *Order* ¶ 50.[4]

[4] On June 8, 2006, shortly before its STA was scheduled to expire, Morris filed a request for extension of the STA. Under FCC rules, Morris was permitted to continue operating its stations while its STA extension request was pending.

In February 2008, the Commission denied Morris's application for review. *Order* ¶ 1. It rejected Morris's claim that the company was similarly situated to licensees that had received staff-level waivers from the installment payment rules in two previous cases.[5] The Commission determined that those cases were distinguishable from this one. *Order* ¶¶ 16-20.

The Commission found no basis for Morris's contention that its waiver request was "virtually identical" to the request that the Division granted in the 1999 *Senter* case. *Order* ¶ 16. The Division in *Senter* waived the automatic cancellation of some licenses because it "recognized that the acceptance of the licensee's [post-default] payments could have been construed as a waiver of the payment deadline." *Id.* ¶ 17 (citing *Senter*, 14 FCC Rcd at 5004). Since *Senter*, however, the FCC had repeatedly and unequivocally explained that "because parties remain obligated for the full amount of their debt following their default on installment payments, the Commission's acceptance of a payment after such a default does not, by itself, constitute a constructive waiver of the automatic cancellation rule or revive an automatically canceled license." *Id.* ¶ 18.[6] In

[5] *See* Application for Review at 9-11 (citing Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., 14 FCC Rcd 5003 (Wireless Tel. Bur. 1999) ("*Senter*"), and *Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc.*, 15 FCC Rcd 23733 (Wireless Tel. Bur. 2000) ("*Lakeland*")).

[6] *See, e.g., 21st Century Telesis Joint Venture,* 16 FCC Rcd 17257, 17261 n.24 (2001) ("*21st Century Reconsideration Order*"), *aff'd, 21st Century Telesis Joint Venture v. FCC,* 318 F.3d 192 (D.C. Cir. 2003); *Lakeland,* 15 FCC Rcd at 23735 (¶ 4) & n.11.

particular, the Commission "began notifying defaulting installment payors individually ... that the acceptance of post-default payments shall not constitute a waiver of their default." *Order* ¶ 18. Indeed, Morris received such a notice in this case. *See id.* at n.63. By contrast, the licensee in *Senter* never received any such notice. *Id.* ¶ 18.

In addition, the licensee in *Senter* "had made regular post-default payments" while its waiver request was pending. *Order* ¶ 17. Morris, in contrast, "ceased making payment on its debt for seven of [its] nine licenses less than a year following its default." *Id.* ¶ 19. Moreover, unlike *Senter*, the record here contained "significant evidence of Morris's inability or unwillingness to meet its financial obligations" – not only "its cessation of post-default payments," but also "its multiple statements indicating that it has been in financial distress, and its requests to renegotiate the terms of its payments." *Ibid.* In light of these factual differences between this case and *Senter*, the Commission concluded: "Morris is ... not similarly situated with the *Senter* licensee, and the Division did not err in finding that Morris's reliance on *Senter* was misplaced." *Ibid.*

Morris also argued that "it detrimentally relied on the Commission's acceptance of its post-default payments, as well as the Division's 'acquiescence' to its construction" of two stations, "as a constructive waiver of its installment payment deadlines." *Order* ¶ 28. The Commission found this "assertion of detrimental reliance unconvincing." *Id.* ¶ 30. Citing *Lakeland,* 15 FCC Rcd at 23735 n.11, the Commission said that Morris "knew, or should have known, that the Commission's acceptance of post-default payments would not," by itself, "constitute a constructive waiver" of the automatic cancellation rule. *Order* ¶ 29. In addition, the Commission disagreed with Morris's assertion that the agency had "acquiesced" to Morris's unauthorized construction of the Charlotte stations. Although Morris had informed FCC staff that it had begun providing service in Charlotte after its licenses had automatically canceled, the Commission concluded that "the Division's silence" in response to this information "could not reasonably have been construed" as a constructive waiver of the automatic cancellation rule: "Morris knew, or should have known, that the automatic cancellation rule operates without the need for further action by the Commission, and that, if it constructed [facilities on the basis of] any canceled licenses, it would do so at its own risk." *Ibid.*

Having determined that Morris was not entitled to a waiver of the automatic cancellation rule, the Commission concluded that Morris could not continue to provide service in Charlotte indefinitely. At the same time, the agency expressed a commitment "to avoiding unnecessary disruptions in service to the public." *Order* ¶ 51. It had previously issued a grant of special temporary authority ("STA") so that Morris could operate its Charlotte stations while its application for review of the *Division Order* was pending. *See id.* ¶ 50. To ensure that Morris's customers would not experience a sudden disruption in service and to provide for an orderly transition, the Commission decided to extend Morris's STA for 180 days from the release of the *Order* denying Morris's application for review. *Id.* ¶ 51.

Under the express terms of the STA, "Morris is not permitted to solicit or add new subscribers in any of the market areas of the subject licenses." *Order* ¶

51. In addition, within five days of the *Order*'s release, Morris was required to provide written notice to each of its current subscribers "that it is not a licensee for the subject licenses; that it is authorized to provide service only under a grant of special temporary authority for 180 days from the release of this Order; and that subscribers must make arrangements with another carrier to obtain continued service at the end of the STA Period." *Ibid.* "After the expiration of the STA Period, Morris will not be authorized to provide further service and shall cease any and all operations on the spectrum that had been assigned under the subject licenses." *Ibid.*

The Commission released the *Order* on February 21, 2008. Therefore, under the terms of the *Order*, Morris's authorization to provide service under the STA will expire on August 19, 2008.

ARGUMENT

To obtain the extraordinary remedy of a stay, Morris must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977). Morris does not come close to satisfying this stringent standard.

I. MORRIS IS NOT LIKELY TO PREVAIL ON THE MERITS

1. To prevail on the merits here, Morris must overcome a very high hurdle. As this Court has repeatedly emphasized, judicial "review of an agency's denial of a waiver is extremely limited." *BDPCS, Inc. v. FCC,* 351 F.3d 1177, 1181 (D.C.

Cir. 2003). The Commission's "refusal to grant a waiver will not be overturned unless the agency's reasons are so insubstantial as to render the denial an abuse of discretion." *Mountain Solutions, Ltd. v. FCC,* 197 F.3d 512, 517 (D.C. Cir. 1999) (internal quotations omitted); *see also Delta Radio, Inc. v. FCC,* 387 F.3d 897, 900 (D.C. Cir. 2004); *BellSouth Corp. v. FCC,* 162 F.3d 1215, 1224 (D.C. Cir. 1999). In this case, the Commission had good reason to deny Morris's waiver request. Consequently, Morris has little chance of persuading the Court to reverse the *Order*.

As the Division recognized when it denied Morris's request, the FCC's rule requiring the timely payment of winning bids "protects the integrity" of the agency's auctions and licensing process. *Division Order,* 20 FCC Rcd at 8179. The Division found that Morris had "failed to demonstrate that the underlying purpose of the Commission's payment rule would not be served, or would be frustrated," by applying the rule to Morris. *Ibid.* The Division also determined that Morris had not identified "any unique facts or circumstances" that would justify a waiver in this case. *Id.* at 8181. The Commission rightly affirmed the Division's sound judgments regarding these matters. *Order* ¶¶ 34, 40.

In its waiver petitions, Morris principally attempted to justify its failure to make timely payments by asserting "that it was uncertain as to the exact amount owed, and that it received its payment notice late." *Order* ¶ 21; *see also* Motion at 2-3 (Morris blamed its late payment on "belated notices from the FCC's collections agent"). Both the Division and the Commission correctly found that Morris's proffered excuse for its default was "insufficient by itself to justify a waiver of the installment payment rules." *Order* ¶ 21. The Commission reasonably concluded that "it is the licensee's responsibility to know the amounts and due dates of its installment payments." *Ibid.* (citing *21st Century Telesis, Inc.*, 15 FCC Rcd 25113, 25119-21 (¶¶ 15-16) (2000), *aff'd, 21st Century,* 318 F.3d 192); *see also Division Order,* 20 FCC Rcd at 8178 (payment notices "are a courtesy," and "each licensee is charged with the responsibility of knowing its installment payment obligations").

The Commission reached a similar conclusion in the *21st Century* case, 318 F.3d 192. In that case, 21st Century (like Morris) failed to make timely installment payments on licenses it won at auction, and those licenses automatically canceled. Then (like Morris) "21st Century sought an extension of the payment deadline or a waiver of the automatic cancellation rule." *Id.* at 196. 21st Century (like Morris) claimed that it was entitled to such relief because it was uncertain about the amount of its installment payments, and because some payment notices from the Commission had been received late. *Id.* at 201. The FCC denied 21st Century's request for relief, and this Court affirmed the agency's action.

The Court held that "21st Century had actual notice of its payment obligations independent of" the payment notices that were allegedly late. *21st Century,* 318 F.3d at 202. In particular, the Court noted that: (1) each of the installment plan notes executed by 21st Century "included an amortization table setting forth the specific amounts due and the date by which the payments were due"; (2) "each license issued to 21st Century stated that full and timely payment was required to avoid license cancellation"; and (3) FCC rules provide that "licensees that miss a payment deadline by more than 180 days are in default and face automatic license cancellation." *Id.* at 201.

So too here. Morris received the same sort of actual notice that 21st Century did. Morris executed an installment payment plan note that described in detail the specific amounts it owed and its payment deadlines. *See* Motion, Exhibit 2. Each of Morris's licenses expressly stated that failure to make full and timely installment payments would result in automatic license cancellation. *See Order* at n.25. And as Morris should know, the Commission's rules provide for automatic license cancellation without further action by the Commission or its staff if a licensee fails to make the required payment (including any applicable late fees) within six months of the due date for its installment payment. *See* 47 C.F.R. § 1.2110(g)(4)(iv). Thus, even assuming that Morris did not receive the January 2002 payment notice on time, the company received ample notice of the terms of its installment payment obligations long before January 2002. Consequently, the Commission – adopting the same reasoning that this Court approved in *21st Century* – properly concluded that Morris's purported uncertainty as to when or how much to pay did not warrant a waiver of the installment payment rules.

2. Morris claims that the Commission's *Order* "raises many serious questions that are at least 'fair ground' for appellate review and injunctive relief." Motion at 9 (quoting *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 195 (4th Cir. 1977)). Even assuming that the existence of "serious questions" might support the grant of a stay, Morris fails to identify a single legal issue that might form the basis for a substantial challenge to the *Order*. The motion devotes a scant three pages to discussing Morris's likelihood of success on the merits; and in those pages, Morris merely lists a series of claims that are largely unsubstantiated and almost entirely undeveloped. Motion at 9-11. These barely articulated arguments – which resemble "bullet points" in their brevity – do not establish the existence of a serious legal question in this case, let alone demonstrate a likelihood that Morris will prevail on the merits. Where (as here) a petitioner fails to present a coherent argument to this Court, "it is not 'the court's duty to identify, articulate, and substantiate a claim for the petitioner.'" *Public Service Electric & Gas Co. v. FERC,* 485 F.3d 1164, 1171 (D.C. Cir. 2007) (quoting *National Exchange Carrier Association v. FCC,* 253 F.3d 1, 4 (D.C. Cir. 2001)).

In all events, none of the arguments mentioned in the motion is sufficiently substantial to justify a stay. For example, Morris asserts that the FCC drew "arbitrary" distinctions between Morris's waiver request "and prior requests that were granted" by FCC staff. Motion at 9. But Morris cites only one staff-level waiver request that was granted: the waiver in *Senter*. As an initial matter, Morris cannot challenge a Commission order based on its alleged inconsistency with staff-level decisions. *See, e.g., MacLeod v. ICC,* 54 F.3d 888, 891 (D.C. Cir. 1995) ("the results reached by the staff in the earlier decisions are irrelevant to our analysis of the Commission's fidelity to its own precedents"). In any event, the Commission reasonably explained why Morris was not similarly situated with the licensee that received the staff-level waiver in *Senter*. *See Order* ¶¶ 16-19.

In *Senter*, the licensee continued to make regular post-default payments, and the Division determined that acceptance of those payments "could have been construed as a waiver of the payment deadline" because the Commission at that time had not clearly articulated a position on this issue. *Order* ¶ 17 (citing *Senter*, 14 FCC Rcd at 5004). Since *Senter*, however, the Commission has unequivocally stated that its "acceptance of a payment after ... a default does not, by itself constitute a constructive waiver of the automatic cancellation rule or revive an automatically canceled license." *Id.* ¶ 18 (citing *21st Century Reconsideration Order,* 16 FCC Rcd at 17261 n.24). And in this very proceeding, an April 2002 letter from the FCC's Office of Managing Director ("OMD") notified Morris that any post-default payments would not resurrect Morris's canceled licenses. *See Order* at n.63. Morris insinuates that this "form letter" from OMD may not reflect official FCC policy. Motion at 9. To the contrary, OMD's letter accurately reflects the FCC's view that the "mere acceptance of a payment after cancellation would not constitute a constructive waiver of the automatic cancellation rule." *See 21st Century Reconsideration Order*, 16 FCC Rcd at 17261 n.24.

Morris also challenges the FCC's finding that Morris did not demonstrate the same commitment to meeting its payment obligations that the licensee in *Senter* showed. Motion at 9-10. The record, however, clearly supported the Commission's conclusion. The licensee in *Senter* "made regular post-default payments" while its waiver request was pending. *Order* ¶ 17. By contrast, "Morris ceased making payment on its debt for seven of the nine licenses less than a year following its default." *Id.* ¶ 19. Furthermore, unlike *Senter*, the record here contained "significant evidence of Morris's inability or unwillingness to meet its financial obligations, including its cessation of post-default payments, its multiple statements indicating that it has been in financial distress, and its requests to renegotiate the terms of its payments." *Ibid.*; *see also id.* ¶¶ 36-39.

Morris contends that the Commission erred in rejecting its claim of "detrimental reliance." Motion at 10. While it seems to suggest that it constructed and began operating its Charlotte stations with FCC authorization, the company built and began operating those stations *before* it received the STA. Therefore, it could not possibly have relied on that STA when it decided to construct and operate those stations.[7]

Morris also makes much of the fact that "the FCC routinely accepted, and deposited, all of Morris's 'post-default' installment payments." Motion at 10. But Morris cannot plausibly argue that the agency's acceptance of these payments amounted to a constructive waiver of the automatic cancellation rule. The agency expressly warned Morris that acceptance of any post-default payments would not waive the company's default or resurrect its canceled licenses. *See Order* at n.63. Moreover, "[i]t is well settled that when a license automatically cancels, the former licensee remains obligated for the full amount of the debt ...." *Order* ¶ 26 (citing

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[7] To the extent that Morris is contending that the FCC's grant of the STA led Morris to believe that its licenses had not canceled, its argument ignores the Commission's past practice. The agency has "granted STAs to parties whose licenses canceled automatically." *Order* ¶ 51; *see, e.g., PinPoint Wireless, Inc.,* 18 FCC Rcd 1904, 1910 (¶¶ 12-13) (Wireless Tel. Bur. 2003). The Commission grants such STAs "to allow former licensees to continue providing service after licenses cancel" so that their customers will not experience sudden "disruptions in service." *Order* ¶ 51. In addition, the STA here allowed Morris to continue operating its stations while the Commission considered its application for review, and it would not have been reasonable for Morris to rely on such temporary relief as an assurance that the Commission would rule favorably on Morris's application.

47 C.F.R. § 1.2110(g)(4)(iv)). Thus, it was hardly surprising that the Commission continued to accept Morris's payments after the licenses canceled. The mere acceptance of such payments "does not constitute a constructive waiver of the automatic cancellation rule." *Order* ¶ 29 (citing *Lakeland,* 15 FCC Rcd at 23735 n.11).

Morris claims to have "raised substantial procedural due process concerns" in this proceeding. Motion at 10. But Morris does not elaborate on those "concerns" in its motion, so it is impossible to tell just how "substantial" they are. To the extent that Morris presented due process claims to the Commission, the agency adequately addressed them. *See Order* ¶¶ 44-51.

Morris also argues that it did not default on its obligations because it "timely pursued its rights to seek a 'grace period or extension of payments' in perfect compliance with the express terms" of its loan agreements. Motion at 11. This argument is not properly before the Court because it was not first presented to the Commission. *See* 47 U.S.C. § 405(a); *Qwest Corp. v. FCC,* 482 F.3d 471, 474-77 (D.C. Cir. 2007). The claim is baseless in any event. The loan agreements allowed Morris to request a grace period or extension of payments only if such relief was "provided for in the then-applicable orders and regulations of the Commission." Installment Payment Plan Note at 2 (attached to Motion as Exhibit 2). When Morris failed to make the payment due on July 31, 2001, FCC rules automatically provided for two 90-day grace periods; and when Morris failed to make payment during either of those grace periods, it was in default, and its licenses automatically canceled pursuant to the Commission's rules. *See Third Auction Rules Order*, 13 FCC Rcd at 436-38 (¶¶ 106-107).

Finally, Morris vaguely alludes to "legal issues surrounding Morris's good faith efforts to enter into a compromise solution with the FCC." Motion at 11. It describes only one such issue in any detail: It complains that the Commission did not treat Morris like NextWave Communications, which reached a settlement agreement with the FCC in 2004 after defaulting on its license payments. This Court lacks jurisdiction to consider that issue because Morris never raised that claim with the Commission. *See* 47 U.S.C. § 405(a); *Qwest,* 482 F.3d at 474-77. In any event, the Commission had good reason for treating Morris differently from NextWave. In *FCC v. NextWave Personal Communications, Inc.,* 537 U.S. 293 (2003), the Supreme Court ruled that the Bankruptcy Code barred the FCC from enforcing its automatic license cancellation rule against a debtor in bankruptcy – NextWave – upon the debtor's failure to make timely payments for the licenses. In the wake of that ruling, the FCC sensibly decided that a settlement agreement with NextWave offered the only means of recouping some of the value of NextWave's licenses. No such circumstances existed in Morris's case.

In sum, none of the inchoate claims mentioned in Morris's stay motion presents a substantial legal question. Morris has not come close to demonstrating that it is likely to succeed on the merits.

II. MORRIS HAS NOT SHOWN IRREPARABLE HARM

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (internal quotations omitted). To obtain a stay, Morris must establish that the irreparable injury it would suffer without a stay would be "both certain and great," "actual and not theoretical." *Ibid.* In other words, Morris must provide "proof indicating that the harm [it alleges] *is certain to occur*." *Ibid.* (emphasis added). Morris has not carried this heavy burden.

Morris contends that if it is forced to stop operating its two Charlotte stations, its "business reputation and competitive posture" will sustain irreparable harm. Motion at 7. This claim is speculative at best. Morris offers no evidence to substantiate its allegation of injury. It does not even document the size of its business or the number of customers it currently serves with its two operating stations. Furthermore, Morris suggests that it faces little competition in the 900 MHz SMR market. *Id.* at 7-8. If that is so, then in the unlikely event that Morris wins this case and regains its licenses, it should have little trouble winning back its customers even if it must suspend service during this litigation. And, not surprisingly, Morris makes no claim of irreparable injury with respect to the remaining seven licenses, since it has never constructed facilities or provided service in the areas covered by those licenses. For these reasons, Morris has failed to establish that it would suffer irreparable harm without a stay.

III. THE EQUITIES IN THIS CASE WEIGH AGAINST A STAY

A stay in this case would not serve the public interest. Congress authorized the FCC to use auctions to award spectrum licenses because it assumed that applicants "who value the spectrum the most, as demonstrated by *bona fide* high bids, are … best able to put that spectrum to its most efficient use." *Division*

Order, 20 FCC Rcd at 8180. Consistent with this premise, the Commission has reasonably found that "requiring licensees to demonstrate their ability to pay as a condition of continuing to hold licenses is essential to an efficient licensing process that is fair to all auction participants." *Order* ¶ 34. A stay here would undermine the purpose of that requirement and the integrity of the licensing process. In particular, a stay would allow Morris to continue providing service without a license and to use spectrum for which it stopped making payments.

Morris argues that the *Order* will irreparably harm Morris's customers by disrupting their service. Motion at 7. As noted above, however, Morris fails even to state how many customers it has, so it is impossible to gauge the extent of this supposed harm. In any event, the Commission acted to minimize any inconvenience that Morris's subscribers would experience. The *Order* directed Morris to notify its customers by February 26, 2008 that it must cease operations by August 19, 2008. *See Order* ¶ 51. That notice, which gave Morris's customers more than five months to make alternative service arrangements, should serve to prevent any serious and sudden disruption in service.

In light of these considerations, the balance of equities tips decisively against a stay in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
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MORRIS COMMUNICATIONS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing "Opposition of Federal Communications Commission to Motion for Stay Pending Review" was served this 14th day of April, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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